

NAVAL WAR COLLEGE
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"DOD Crime Fighters: Do the Right Rules Apply?"

by

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A paper submitted to the faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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Table of Contents

1. Introduction	1
2. History	2
3. Current Effort	5
4. Legal Constraints	8
5. Support to Law Enforcement	11
6. Conclusion	16
7. Endnotes	18
8. Bibliography	20

"DOD Crime Fighters: Do the Right Rules Apply?"

INTRODUCTION

The Department of Defense (DOD) has been actively involved in America's war on drugs through counterdrug (CD) operations for almost twenty years. U.S. military forces have made a significant contribution to this effort during that time in a variety of different ways. Given the value of DOD's CD efforts to law enforcement in deterring the supply of illegal drugs into the United States, it seems unlikely that DOD's involvement in CD operations will end any time in the near future. While military forces' efforts have evolved over the years, DOD should continue to seek opportunities to improve the overall mission through various measures.

Under the present structure, DOD assistance is provided through Joint Task Forces (JTF) under various U.S. CINCs. Given the long-standing nature of these task forces, it would seem more appropriate for DOD to assign CD operations responsibilities to subordinate unified commands specifically designated to conduct the long-term operations needed. Second, DOD should seek reduced legal constraints in order to pursue a more primary role in CD operations overseas rather than merely provide a supporting role to law enforcement agencies (LEAs), both domestic and foreign. Finally, since most of DOD's efforts will likely continue in support of LEAs, consideration should be given to providing senior executive level military training to certain personnel of the lead LEA's involved. Any

or all of these proposed changes could serve to enhance the overall CD effort and render more effective results.

HISTORY

Drug abuse has been a problem for the United States for many years, and as early as 1982, Congress, in the face of serious DOD reluctance, recommended the use of the military in the anti-drug effort. This early assistance involved mainly sharing drug-related intelligence, lending of military equipment to U.S. law enforcement, assistance in the operation of the equipment, and making use of military facilities available to federal agents. Military participation in drug interdiction on the borders and abroad expanded rapidly after April 1986, when President Reagan issued a National Security Directive declaring drug trafficking " a lethal threat to U.S. National Security." ¹ Increased funding by Congress for FY 1987 allowed for greatly expanded military support to the Coast Guard with the development of the Tactical Law Enforcement Teams (TACLETS). Under this concept, Navy ships, with assigned U.S. Coast Guard (USCG) detachments aboard, began to be utilized for interdiction of suspect vessels. Additional expanded efforts also included establishment of the Air Force drug surveillance program to assist in the interdiction effort.

DOD's sharing of intelligence regarding drug-trafficking with law enforcement agencies became a major contribution in the late 1980's. The Navy provided many hours of aerial

surveillance over the Caribbean, the Gulf of Mexico and the Mexican border to U.S. Customs Service (USCS), USCG, and the Drug Enforcement Agency (DEA) relative to suspected drug smuggling. The Air Force also provided radar support to Customs communications facilities as well as monitoring support from AWACS planes with Customs officials onboard. The Marines, National Guard (including Air Guard) also provided ground and aerial surveillance intelligence. Several joint operations were conducted by DOD and U.S. LEAs in surveillance and interdiction efforts.

Also in the 1980's, DOD became more involved in foreign drug control programs in Latin America and the Caribbean. Small numbers of military personnel provided support to foreign LEA's with transportation, communications, planning and intelligence collection. In Bolivia in 1986, U.S. Army personnel assisted with helicopter transport while local law enforcement and DEA officials made arrests and destroyed drug production facilities. The political backlash in Bolivia regarding U.S. military involvement in such activities was severe and caused the Bolivian politicians to rethink such high profile use of military forces. Thus while some of the early foreign drug control efforts by the U.S. military were viewed as being successful in the short term, the political costs were controversial and counterproductive.²

In 1988 Congress passed the Anti-Drug Abuse Act of 1988. This legislation required that the "war on drugs" attack not only the supply side of the problem, but also the demand side

by using education, treatment and other social programs to reduce the consumption of drugs within the U.S. This two-pronged approach to the problem, however, did not reduce the military's role, but led to further expansion of military involvement in CD activities. The Act established the Office of National Drug Control Policy (ONDCP) which is responsible for the implementation of a national drug control strategy and certification of the drug-control budget. The ONDCP strategy is required to be "comprehensive and research based, contain long-range goals and measurable objectives, and seek to reduce drug abuse, trafficking, and their consequences." ³ The ONDCP strategy specifies how all resources, including the military, will be utilized towards accomplishing its goals.

In addition to this act, the 1989 Defense Authorization Act was passed, designating DOD as the lead federal agency in the detection and monitoring (D&M) of aerial and maritime transit of illegal drugs into the U.S. Moreover, the act required DOD to be responsible for integrating federal command, control, communications, and technical intelligence assets dedicated to interdiction into an effective communications network, and to approve and fund state governors' plans for expanded use of the National Guard in support of state interdiction and enforcement operations.

All of the above efforts have continued and expanded through today, thus becoming an integral, essential adjunct to law enforcement. Since active involvement by the military began, it is clear a great deal of time, study and planning

has been devoted to the mission. Significant funding by Congress has also been provided toward the DOD effort, including \$725 million in FY99.⁴ For the most part, however, DOD's role remains a support mission to law enforcement vice a primary responsibility.

CURRENT EFFORT

The National Drug Control Strategy of 1999 lists five major goals of the ONDCP. Goals one through three are the demand reduction initiatives involving education, treatment and social programs. Goals four and five are those that most specifically apply to U.S. military involvement. They state, " Goal 4: Shield America's air, land and sea frontiers from the drug threat," and " Goal 5: Break foreign and domestic drug sources of supply." ⁵

In response to Congressional mandates and the goals of the National Drug Control Strategy, DOD has implemented a wide variety of CD measures under the responsibility of four U.S. CINC's - CINCPAC, CINCJFCOM (formerly CINACOM), CINCNORAD, and CINCSOUTH. Each CINC utilizes subordinate and component commands to carry out their CD missions, which vary significantly according to their areas of responsibility (AOR's). CINCJFCOM, through FORCES COMMAND (FORSCOM), at Fort McPherson, Georgia, has authority for all CD operations in the continental U.S. (CONUS), and has designated JTF-6 at Ft. Bliss, Texas as responsible for coordinating support to LEA's within CONUS.

CINCSOUTH, on the other hand, conducts its CD efforts mostly through D&M and support to Host Nations within its AOR. Utilizing Joint Interagency Task Forces (JIATF) South and West for air and maritime D&M operations, CINCSOUTH employs numerous other military components to provide CD operational support, non-operational CD support and host nation support. CINCSOUTH's " CD strategy is integrated into its theater military mission...because illegal drug production and trafficking problems cannot be separated from the economic, social, and political ills of the region." ⁶ CINCSOUTH's CD mission is considerably demanding and a higher priority than those of other CINCs.

CINCPAC coordinates its D&M operations through JIATF-West and provides intelligence, logistics and planning support to LEA's and host nation CD operations in the AOR. CINCPAC's CD efforts are particularly challenging because of its " overwhelming maritime geographic characteristic and physical size." ⁷ Finally, CINCNORAD's responsibilities include surveillance and monitoring of aircraft suspected of smuggling illegal drugs into North America through radar sensor monitoring at their regional air operation centers (ROAC's). NORAD also maintains fighter aircraft to assist LEA's with CD surveillance. Significant support is also provided by U.S. Special Operations Command (USSOCOM) through training and assistance to other government agencies and host nations.

Joint Pub 0-2 (*Unified Action Armed Forces*) states, " a joint task force may be established on a geographical area or

functional basis when the mission has a specific limited objective and does not require overall centralized control of logistics." ⁸ It further states that " a JTF is dissolved... when the purpose for which it was created has been achieved or when it is no longer needed." ⁹ Given those descriptors, one must question whether the several long-standing JTF's described in the preceding paragraph are, in fact, the proper command structure to assume responsibility for CD operations. While the objective appears " specific" at first look, the mission seems to be significantly broader than perhaps initially expected. Additionally, it is clear at this point in time, that these task forces have a long-term mission in CD support as opposed to " limited objectives" that can be met anytime in the near term. It would, therefore, seem more appropriate for the mission to be carried out under subordinate unified commands " to conduct operations on a continuing basis." ¹⁰ These commands would have permanently assigned personnel and liaison members to enhance the continuity of the efforts. According to Joint Pub 3-07.4, JIATF-W (CINCPAC) has no permanently assigned forces, but "assets are tasked as required to operate under JIATF-W TACON or in support of JIATF-W's CD mission." ¹¹ Clearly this structure could result in minimal CD support, depending on other priorities. Lack of permanent forces can be counterproductive to a committed, efficient and effective accomplishment of the CD goals. Placing CD operations under a subordinate unified command could serve to address this

problem. Opponents to such a suggestion would likely argue that personnel shortages would preclude such assignments, however, the priority of CD operations in an AOR such as that of CINCSOUTH could justify such a structure.

LEGAL CONSTRAINTS

DOD's involvement in CD efforts is regulated by federal statutes, which impose certain restrictions on the use of military forces for law enforcement purposes. Most significantly is the Posse Comitatus Act.¹² The Act prohibits the use of the Army and Air Force to execute the civil laws of the U.S. except when expressly authorized by the Constitution or Act of Congress.¹³ An amendment to the Army Appropriation Act of 1878, the Act was a reaction to the use of federal troops to enforce civil rights laws in southern states after the Civil War, during the Reconstruction Period. The prohibition in the Act has also been extended to the Navy and Marine Corps as a matter of DOD policy.¹⁴ In conjunction with the increased desire to utilize military forces in the "war on drugs," Congress provided an express exception to the Posse Comitatus Act, to allow DOD to share drug related intelligence, lend military equipment to U.S. LEAs, assist in the operation of equipment and make military facilities available to LEAs. The exception continued the prohibition regarding direct involvement of the military in searches or arrests of civilians, and further prohibited any DOD assistance that would adversely affect military readiness.¹⁵

The constraints placed on DOD by the Posse Comitatus Act seem relatively reasonable with regard to use of military forces within U.S. borders. Military forces are not trained in the fundamentals of constitutional law or a graduated continuum in the use of force, areas where law enforcement rightly places significant focus and training. U.S. military forces already respond to a myriad of responsibilities governed by complex requirements and regulations, and they certainly do not need to add domestic law enforcement to their overloaded bag of tricks. Moreover, for those instances when law enforcement is unable to effectively deal with specific occurrences or special events, such as the Los Angeles riots and the 1996 Olympic Games in Atlanta, express statutory exceptions to the Posse Comitatus Act are available to permit the military to execute the law.¹⁶ So, for those rare occasions when truly necessary, the military can be utilized in a law enforcement function.

It is the use of U.S. military forces outside the United States for law enforcement purposes which is arguably an area where the military could be more useful. In his book, ***The Phoenix Solution***, former Los Angeles District Attorney Vincent Bugliosi, makes a strong and compelling argument that if the United States is serious about winning the war on drugs, much stronger action by the military is required. Specifically speaking to the problem of the Colombia drug cartels, Bugliosi proposed the use of military special forces units to extract drug kingpins from Colombian territory by force, and bring

them to the United States for trial for their crimes. He argued that due to Colombia's inability to deal effectively with the drug cartels and the reign of terror perpetrated by the drug lords to intimidate public officials from taking appropriate action, the U.S. should have considered taking unilateral action with a small, specialized military force. While the current situation in Columbia has changed somewhat due to the splintering of the cartels within the past few years, the premise of utilizing military forces for such operations outside the U.S. could be effective and have validity.

The current situation in Colombia in which drug traffickers have joined forces with two left-wing insurgent groups, the Revolutionary Armed Forces of Colombia (F.A.R.C) and the Army of National Liberation (E.L.N.), now presents even more complex problems in close proximity to U.S. borders. Generously funded by drug traffickers in exchange for protection, the F.A.R.C. is becoming increasingly well-armed with more sophisticated weapons. Moreover, in an effort to end the war with the guerrillas, President Pastrana of Colombia gave the group control over a large territory within the country in hopes of furthering peace negotiations. According to a recent news article, " The guerrillas quickly turned it into an armed protectorate and a coca-growing factory, and the peace talks have floundered." ¹⁷ This symbiotic relationship between the drug traffickers and insurgents now blurs the distinction between U.S. CD efforts

and Foreign Internal Defense assistance to Colombia's legitimate government. Any U.S. military intervention on the behalf of the Colombian government could have unpopular and counter-productive results similar to those in Bolivia in the 1980's. It could serve to fuel retaliation and intimidation from the cartels against government officials as has happened in the past. On the other hand, unilateral military intervention by U.S. forces for CD purposes in this situation would not only address the drug production/trafficking problem, but would also unofficially assist the Colombian government's counter-insurgency efforts.

In response to those who would protest use of military force in CD efforts in foreign countries on the basis of the Posse Comitatus law, Bugliosi argues that, "It is very doubtful that the law even has any extra-territorial application, i.e., whether it prohibits the use of the military to carry out civilian law enforcement functions outside this nation's borders. Federal courts have held that 'in the absence of statutory language indicating a contrary intent,' there is a presumption that statutes apply only to conduct occurring *within* the territory of the United States." ¹⁸ This position is also supported by a 1989 Department of Justice, Office of Legal Counsel opinion which concluded that the Posse Comitatus Act does not have extraterritorial application. ¹⁹ Some courts have also adopted the view that the Posse Comitatus Act imposed no restriction on use of U.S. armed forces abroad. ²⁰

Bugliosi also argues that the President could order such military actions on the basis of protecting, " the general welfare and security of this nation," ²¹ thereby circumventing the Posse Comitatus law by relying on his constitutional authority as Commander-in-Chief. Indeed, some of the very strong language used by previous administrations regarding the war on drugs could justify such force based on our national security interests. As stated above, in April 1986, President Reagan issued a National Security Decision Directive, declaring drug trafficking a " lethal" threat to U.S. national security.²² Under President Bush, Secretary of Defense Richard Cheney declared detecting and countering the production and trafficking of illegal drugs to be a high priority, national security mission for the Pentagon.²³ The goal of protecting U.S. borders from the "scourge" of illegal drugs has been clearly expressed as a threat to national security, which could warrant military intervention.

Another counter-argument to the use of DOD to enforce U.S. drug laws in other countries is that to do so would be a violation of international law. The United States typically takes the moral high ground in issues pertaining to the sovereignty of other nations. However, if a drug producing nation presents continual threats to U.S. borders and national security, and refuses to cooperate with U.S. requests for assistance in dealing with the problem, it could offer few alternatives to U.S. intervention. There is currently no international governing body to address problems pertaining to

international crimes such as drug-trafficking. While the United Nations (U.N.) has recognized the need for international opposition to the illegal drug trade, and has adopted a ten-year conceptual framework to address the problem,²⁴ there is no existing enforcement arm to deal with international crimes. In fact, while many members of the United Nations are pursuing the establishment of an International Criminal Court (ICC), it has been generally accepted that the crimes addressed by the court would be those such as genocide, aggression, war crimes, and crimes against humanity. The U.N. Preparatory Committee working on the ICC issue determined that offenses such as drug trafficking and terrorism, " were best left to national judicial systems." ²⁵

SUPPORT TO LAW ENFORCEMENT

It is essential to recognize that illegal drug trafficking is first and foremost a law enforcement issue, and primary jurisdiction for dealing with drug offenses falls upon LEAs. As a result, DOD's participation in CD activities is inevitably a multi-agency affair. To make matters more complex, there are numerous different local, state and federal LEA's, as well as foreign LEAs, with varying and sometimes overlapping jurisdictions in the area of narcotics control with which military forces must coordinate their CD efforts.

Additionally, while LEAs lead the drug effort and must work closely with military forces in this effort, there is no doubt a great lack of understanding between law enforcement

and the military. This is recognized in Joint Pub 3-07.4 which states, " An understanding of each organization's roles, missions, and structure will help those involved in CD operations to better communicate and cooperate in the effort to reduce illegal drug supply and demand." ²⁶ Other than the military criminal investigative organizations (MCIOs), few law enforcement agencies are familiar with military command procedures and functions. Moreover, while federal law enforcement agencies have excellent training facilities, there is no comparable senior leadership institution such as the military war colleges for law enforcement leaders. It might be worthwhile to consider making occasional billets available at facilities such as the Army War College and the Naval War College for federal law enforcement officials who will thereafter be assigned to positions within the JTFs (or subunified commands as suggested herein), to enhance interagency cohesion. Specifically, agents from the DEA, Customs Service and the FBI, those agencies which typically take the lead in the CD effort, could not only gain a better understanding of U.S. military forces, but could gain valuable insight into military operational planning as well as develop meaning relationships with future military leaders. This would obviously not have immediate rewards and would require commitment of funds and personnel from the LEAs, however DOD could serve to enhance interagency cooperation through this method with minimal effort involved.

The greatest disadvantage for the DOD in CD operations is that other than D&M, the military does not lead the effort. Primarily, military forces provide support, albeit, extremely critical support, to law enforcement agencies, which apply a totally different rule set to conducting operations. Thus, while the U.S. military forces have quite obviously devoted significant effort to applying their principles to the CD effort, as evidenced in the Army's *Campaign Planning for the Drug War*²⁷ and *Strategic Planning and the Drug Threat*,²⁸ they seldom have the opportunity to apply such military operational planning to their CD effort. This support role for a mission in which they have little control, is likely viewed merely as a collateral responsibility. Inasmuch, it is questionable as to how much level of effort can be afforded to the mission at times, particularly when other priorities in today's national strategy of engagement, take precedence. For example, a recent GAO report stated DOD's CD effort in South America "has declined drastically in recent years and has created a shortfall in monitoring drug traffic."²⁹ This is reportedly due to the fact that some of the surveillance equipment utilized in the CD mission has been diverted to higher priority missions in Iraq and Kosovo. Another explanation given by the Pentagon is the decline in overall force structure between 1992 and 1999, and the unexpectedly high number of other global missions.

For obvious reasons, when Congress passed the laws authorizing the use of DOD in CD efforts it included the

stipulation that such efforts must not impact on their readiness to respond to other more pressing issues. While this appears appropriate, it creates a loophole for military commands to justify reductions in their CD effort for a variety of reasons, all potentially very valid. In other words, DOD's CD commitment varies depending on what else is happening in the world, and no doubt so does the effort. If DOD were given a greater responsibility in the war on drugs, i.e. the ability to plan and carry out their own operations rather than merely providing LEAs the support to do so, one could anticipate a much greater commitment and sense of accomplishment. This is not to say that the support to LEAs would lessen, however, given more control in specific aspects of the mission, such as described above, DOD would undoubtedly have a greater stake in its overall success. As it now stands, DOD's mission is essentially a supporting role that while meaningful, is seen as detracting from other higher priorities.

CONCLUSION

Illegal drug trafficking and production is a problem that transcends a military or law enforcement solution. It is an economic commodity of huge proportion with a tremendous financial profit, which makes it well worth the potential risks for those undertaking the endeavor. While it would be unrealistic to believe America's drug problem, both the supply and demand sides, will ever be totally eliminated, the U.S.

must continue to aggressively pursue reductions on both fronts. The illegal drug trade, as well as other transnational crimes such as terrorism and money laundering, present new challenges to the United States which pose distinct threats to our national security. Where economic, political and diplomatic efforts fail to address such problems, we must be prepared to take unilateral action, including military force, in situations that lend themselves to such remedy. Clearly such actions would not be frequent or common place, however, given the pervasive nature of the drug problem, the United States must not limit its options for addressing the issue. Moreover, DOD should continue to attempt to improve and enhance their CD efforts through assignment of the mission to permanent subordinate unified commands and through increased cohesion and coordination with LEAs. The U.S. government expends a vast amount of money and energy in the interest of other nations every day. It must also use its military resources effectively, efficiently and creatively to protect its own national interests from these ever-increasing threats to our society.

Endnotes

¹ Bruce M. Bagley, "Myths of Militarization: Enlisting Armed Forces in the War on Drugs" in *Drug Policy in the Americas*, editor Peter Smith, Westview Press, Boulder, CO, 1992. P. 131.

² Ibid. p.136.

³ United States Government, Office of National Drug Control Policy, *The National Drug Control Strategy*, 1999, p.3.

⁴ United States Army, *Operational Law Handbook 2000*, JAG School, Charlottesville, VA, FY2000, p.27-21.

⁵ *National Drug Control Strategy*, 1999, p.7.

⁶ United States Armed Forces, Joint Pub 3-07.4, p. VI-3.

⁷ Ibid. P. VI-19.

⁸ United States Armed Forces, Joint Pub 0-2, p. IV-9.

⁹ Ibid, p. IV-9.

¹⁰ Ibid, p. IV-8.

¹¹ United States Armed Forces, Joint Pub 3-07.4, VI-22.

¹² Title 18, United States Code 1385.

¹³ United States Army, *Operational Law Handbook 2000*, JAG School, Charlottesville, VA, FY 2000, p. 27-10.

¹⁴ DOD Directive 5525.5.

¹⁵ Bagley, "Myths of Militarization: Enlisting Armed Forces in the War on Drugs," p.130-131.

¹⁶ For example, 10 U.S.C. 331 et.seq. permits use of the armed forces to suppress insurrections and domestic violence under certain circumstances.

¹⁷ Larry Rohter, *Weave of Drugs and Strife in Colombia*, New York Times, 21 April 2000, p.A10.

¹⁸ Vincent Bugliosi, *The Phoenix Solution*, Dove Books, Beverly Hills, CA, 1996, p. 128-129.

¹⁹ *Operational Law Handbook*, p.27-12. (The Office of Legal Counsel provides definitive guidance within the Executive Branch on the interpretation of Federal Statutes.)

²⁰ Ibid. pp. 27-12, 27-13.

²¹ Bugliosi, *The Phoenix Solution*, p.133.

²² Bagley, "The Myths of Militarization: Enlisting Armed Forces in the War on Drugs", p.131.

²³ Ibid. p.137.

²⁴ United States Government, *The National Drug Control Strategy*, 1999. P. 81.

²⁵ Michael N. Schmitt and Major Peter J. Richards, "Into Uncharted Waters" in *Naval War College Review*, Newport, RI, Winter 2000, p.97.

²⁶ United States Armed Forces, Joint Pub 3-07.4, p. III-1.

²⁷ Murl D. Munger and William W. Mendel, *Campaign Planning and the Drug War*, Strategic Studies Institute, U.S. Army War College, Carlisle Barracks, PA, 1991.

²⁸ William W. Mendel and Murl D. Munger, *Strategic Planning and the Drug Threat*, Strategic Studies Institute, U.S. Army War College, Carlisle Barracks, PA, 1997.

²⁹ Robert Wall, "GAO Busts Pentagon's Counterdrug Support," in *Aviation Week & Space Technology*, New York, January 17, 2000.

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